



STATE OF INDIANA

MICHAEL R. PENCE, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

May 28, 2015

Mr. Andrew Straw, Esq.
241 A Brittany Dr.
Smallwood, IL 60107

Re: Formal Complaint 15-FC-139; Alleged Violation of the Access to Public Records Act by the City of South Bend

Dear Mr. Straw,

This advisory opinion is in response to your formal complaint alleging the City of South Bend ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The City has responded to your complaint via Mr. Paul Singleton, Esq. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on April 20, 2015.

BACKGROUND

Your complaint dated April 20, 2015 alleges the City of South Bend violated the Access to Public Records Act by failing to provide the records you requested.

On March 20, 2012, you made a request to the city requesting emails regarding the appointing of Housing Authority commissioners. You requested all emails on this regard from January 1, 2011 to August 8, 2012. You contend the City never provided you with the records you requested.

On May 3, 2015, the City responded to your formal complaint. The City raises objections on timeliness, noting your complaint was filed outside the thirty (30) day statute of limitations. The City also contends it was unaware of any issues you had during your communications with City officials.

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
LUKE H. BRITT**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

of public officials and employees, whose duty it is to provide the information.” See Ind. Code § 5-14-3-1. The City of South Bend is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the City’s disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

Simply put, this request has languished for years. Your original request was on March 30, 2012. The request appears to have been amended and renewed several times over the last few years; however, the City should have been on notice the entire time that your request was pending. Three (3) years to respond to a public records request without producing any of the records is well outside the scope of a ‘reasonable’ timeframe contemplated by the APRA. Conversely, however, this matter should have been brought to this Office’s attention prior to the filing of your formal complaint on April 20, 2015. There were several opportunities to utilize the formal complaint process based upon the timeline of events provided by your complaint and the City’s response.

So while the City is correct your complaint is untimely under Ind. Code § 5-14-5-7, the Public Access Counselor has discretion to opine on any APRA request. A public agency still bears the burden under the APRA to keep track of outstanding requests and to fulfill them, regardless of how long it takes to gather the documents. The mere fact the requestor has failed to inform the public agency a request is still pending is not fatal, because the burden under APRA is with the public agency to provide the records or a justification for nondisclosure. A requestor’s failure to maintain a constant stream of communications does not excuse the public agency from the original request, which is still unfulfilled.

The City’s contention it has exceeded its duties is undercut by the fact that emails provided state city officials were still attempting to gather the records as of March 18, 2013. Even assuming the request has lapsed after the March 2013 email, the November 2014 email shows some element of the request was ongoing.

A complaint should have been filed once it became clear the City was failing to provide the records. It was clear the City had abandoned its duty to respond to your request in 2013 at the very latest. It may very well be the City would take a number of months to compile and produce the emails after review and potential redaction. However, the size of a request does not lend itself to a *de facto* denial, nor does it alleviate the agency’s responsibility to ultimately fulfill the request or give a justification as to a denial. Based



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
LUKE H. BRITT**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

upon Ind. Code § 5-14-5-7, I am unable to issue a conclusive determination, however, if I were to do so, I would have stated the City has not acted in compliance with the APRA.

Regards,

A handwritten signature in black ink, appearing to read "LH Britt", is written over a light blue horizontal line.

Luke H. Britt
Public Access Counselor

Cc: Mr. Paul Singleton, Esq.